Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
	)	
Telephone Consumer Protection Act of 1991	)	

COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") hereby submits these comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") in the above captioned proceeding.[1] In the FNPRM, the Commission seeks comment on a proposed limited safe harbor period for calls to numbers recently ported from wireline subscribers to wireless services ("intermodal ports"), during which telemarketers will not be liable for violating the Commission's rule prohibiting the placement of autodialed and prerecorded message calls to wireless numbers.[2] The Commission also asks whether it should amend its safe harbor provisions for telemarketers to mirror any amendment made by the Federal Trade Commission ("FTC") to its safe harbor provision. AT&T believes the Commission should adopt a limited safe harbor period of thirty (30) days in which telemarketers must remove intermodal ports from their call lists, and should mirror any amendment adopted by the Federal Trade Commission to the cognate safe harbor provision of the FTC's telemarketing sales rule.

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[1] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Further Notice of Proposed Rulemaking, FCC 04-52 (released March 19, 2004).

[2] 47 C.F.R Section 64.1200(a)(1)(iii) (prohibiting the placement of telemarketing calls to "any telephone number assigned to a paging service, cellular telephone service, specialized

INTRODUCTION

In its Notice of Proposed Rulemaking in this proceeding ("NPRM"),[3] the Commission sought to determine whether it should revise regulations enacted in 1992 to carry out Congressional directives in the Telephone Consumer Protection Act ("TCPA")[4], and proposed a number of changes to its rules prohibiting autodialed telemarketing calls to wireless subscribers. In particular, the Commission sought comment on the nature and frequency of telemarketing solicitations to wireless subscribers, how telemarketers will identify wireless numbers once consumers are able to port numbers from their wireline phones to wireless phones, and whether the Commission's rules should be modified to facilitate telemarketers' efforts to comply with the TCPA by creating a "safe harbor" for specified telemarketing activities.[5]

The comments filed in response to the NPRM showed that telemarketing to wireless phones could be expected to increase: as wireless consumers begin to rely less upon their wireline phones and their usage shifts to wireless phones, wireless numbers would tend to be distributed more broadly.[6] The comments further showed that as consumers began to port numbers from wireline services to wireless services in increasing numbers, the difficulty in distinguishing wireless numbers from wireline numbers would increase as well.

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mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.")

[3] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 and CC Docket No. 92-90, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd 17459,17485, paras. 43-45 (2002). In the Memorandum Opinion and Order, the Commission closed and terminated CC Docket No. 92-90 and opened a new docket to address the issues raised in this proceeding.

[4] 47 U.S.C. Section 227.

[5] NPRM, paras. 43-46.

[6] See e.g.Reply Comments of AT&T Wireless, CC Docket No. 02-278 and CC Docket No. 92-90, filed January 31, 2003, p.21.

A number of parties recognized the difficulty in identifying intermodal ports, but no party offered a definitive solution. Verizon argued that wireless portability will make it difficult to discern whether a number has been assigned to a wireless service or a wireline service, but offered only that a wireless carrier could address the issue by providing call intercept capabilities to subscribers who do not wish to receive telemarketing calls.[7] The National Consumer League suggested that telemarketers "use technology that would enable telemarketers to distinguish between wireless and landline phones."[8] CTIA indicated that telemarketers might use the Interactive Voice Response system being developed by Public Safety Answering Points to determine whether a ported number relates to a wireless or a wireline service, but provided neither a detailed solution nor a timeline for implementation.[9] AT&T Wireless thus argued that the Commission should institute further proceedings on its "do not call" rules to address how telemarketers might distinguish between wireless and wireline numbers in a porting and pooling environment.[10]

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[7] Comments of Verizon, CC Docket No. 02-278 and CC Docket No. 92-90, filed December 9, 2002, pp. 20-21.

[8] Comments of National Consumer League, CC Docket No. 02-278 and CC Docket No. 92-90, filed December 6, 2002, p. 7.

[9] Comments of CTIA, CC Docket No. 02-278 and CC Docket No. 92-90, filed December 9, 2002, p. 6. See also Comments of AT&T Wireless, p. 32 and fn. 111).

[10] Reply Comments of AT&T Wireless, pp. 32-33 ("[O]n the key issue of how telemarketers will distinguish between wireless and wireline numbers once wireline numbers can be ported to wireless phones, the NPRM only acknowledges the issue but does not set forth specific proposals for comment. Commenters propose a number of ways that telemarketers could attempt to identify wireless numbers once porting and pooling go into effect, but do not discuss their proposals in detail. The Commission and all the parties would likely benefit from an FNPRM that proposes a specific method for dealing with the wireless numbers in the porting and pooling environment, which the Commission could refine based on the parties' comments and additional industry consideration of potential technical solutions.")

On July 3, 2003, the Commission issued its Report and Order in CG Docket No. 02-278 ("Report and Order").[11] In the Report and Order, the Commission stated that although the record did not reflect the full panoply of methods telemarketers might employ to avoid calling wireless telephone numbers, the commenting parties had provided a fair sampling of such methods.[12] While the record showed that telemarketing to wireless phones had not yet become a widespread practice, the Commission recognized that the practice of sending marketing messages to wireless phones was likely to increase.[13] The Commission further acknowledged that wireless customers are charged for incoming calls from telemarketers, regardless of whether customers pay for their minutes in advance or after the minutes are used, and that telemarketers have no way to determine how consumers are charged for their wireless service.[14]

In the Report and Order, the Commission determined that it would extend the prohibitions of the TCPA to calls placed to wireless subscribers, finding that the statute and the Commission's rules should prohibit calls, with limited exceptions, "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other

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[11] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCCR 14014.

[12] Report and Order, para. 163 and fn. 587. As an example, the Commission cited the Direct Marketing Association's (DMA) Telephone Preference Service, which enables consumers to opt-out of national telemarketing lists, allowing consumers to register their wireless phone numbers in order to ensure that they do not receive telemarketing calls on their wireless phones. Id. fn. 588.

[13] Id. para. 163 and fn. 583 ("The record suggests that while consumers receive telemarketing calls on their wireless phones, it is not a widespread practice at this time. However, some industry members believe that telemarketing calls to wireless numbers are likely to increase, particularly as growing numbers of consumers use wireless phones as their primary phones.") (citations omitted).

[14] Id. para. 165 ("Congress found that automated or prerecorded telephone calls were a greater nuisance and invasion of privacy than live solicitation calls. Moreover, such calls can be costly and inconvenient. The Commission has long recognized, and the record in this proceeding supports the same conclusion, that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.") (citations omitted).

common carrier service or any service for which the called party is charged."[15] The Commission concluded that under the TCPA, it is unlawful to make any call using an automatic telephone dialing system or a prerecorded message to any wireless telephone number.[16]

The Commission declined to mandate a specific solution to the problem of identifying numbers ported from wireline to wireless services, relying instead on the telemarketing industry to adopt solutions that ensure compliance with the requirements of the TCPA as wireline-to-wireless local number portability ("LNP") is implemented.[17] The Commission asserted that LNP does not make it impossible for telemarketers to comply with the TCPA, noting that information is available from a variety of sources to assist telemarketers in determining which numbers have been assigned to wireless carriers, and in identifying intermodal ports.[18] Because the Commission's LNP decisions date back to 1996, and the FCC had granted a number of extensions to the effective date of wireless LNP, the Commission concluded that telemarketers

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15 Id. para. 165 ("[I]t is unlawful to make any call using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number [citation omitted].") The Commission has determined not to prohibit all live telephone solicitations to wireless numbers, but has concluded that the TCPA prohibits live solicitation calls to wireless numbers using an autodialer. Id. para. 166 and fn. 611.

16 The Commission's rule is codified at 47 CFR Section 64.1200(a)(1)(iii). The national do-not-call database will allow for the registration of wireless telephone numbers for those subscribers who wish to avoid live telemarketing calls to their wireless phones. Report and Order, para. 166 and fn. 612.

17 Intermodal number portability went into effect on November 24, 2003, requiring carriers to allow consumers to transfer their telephone numbers from wireline service providers to wireless service providers. Telephone Number Portability, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697 (rel. Nov. 10, 2003).

18 Report and Order, para. 170. In the Report and Order, the Commission cited NeuStar as the North American Numbering Plan Administrator, the National Pooling Administrator, and the LNP Administrator (each of which makes information available that can assist telemarketers in identifying numbers assigned to wireless carriers) as well as other commercials enterprises such as Telcordia, the owner-operator of the Local Exchange Routing Guide, which maintain information that can assist telemarketers in identifying numbers assigned to wireless carriers.

had been given sufficient advance notice to implement effective means of identifying intermodal ports.

On March 19, 2004, the Commission released its Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking ("FNPRM") in these proceedings, seeking comment, *inter alia*, on a proposed safe harbor for calls to wireless numbers that had recently been ported from a wireline service to a wireless service provider.[19] In the FNPRM, the Commission noted that after intermodal LNP had become effective, several parties had raised concerns about how to identify intermodal ports in order to comply with the TCPA's prohibition.[20] The Commission thus sought additional comment on the "narrow issue" of whether the Commission should adopt a "limited safe harbor" during which a telemarketer will not be liable for violating the rule prohibiting autodialed and prerecorded message calls to wireless numbers, and on the appropriate duration of the "safe harbor" period.[21] The Commission also requested comment on

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[19] In the Matter of Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, CG Docket No. 04-53, and Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 04-52 (released March 19, 2004), para. 46.

[20] Id. para. 45. The DMA and the Newspaper Association of America (NAA) submitted a Petition for Declaratory Ruling asking the Commission to adopt a safe harbor for calls made to any wireless number regardless of whether the number was recently ported to wireless service, arguing that inadvertent calls to wireless numbers are as inevitable as erroneous calls to numbers on the national Do-Not-Call list. Under the DMA/NAA's "safe harbor" proposal, if a marketer subscribes to a wireless suppression service and uses a version of the data that is no more than 30 days old, the marketer would not be liable under the TCPA for erroneous calls to wireless numbers. See Petition for Declaratory Ruling, Direct Marketing Association and Newspaper Association of America, filed January 29, 2004 ("DMA/NAA Petition") pp. 4-5.

[21] Id. para. 49 ("[W]e seek comment on the appropriate safe harbor period given both the technical limitations on telemarketers and the significant privacy and safety concerns regarding calls to wireless subscribers. For example, would a period of up to seven days be a reasonable amount of time for telemarketers to obtain data on recently ported numbers and to scrub their call lists of those numbers? Or, as the DMA has requested, should any safe harbor the Commission adopts provide telemarketers with up to 30 days to do so?")

whether it should mirror any amendment adopted in a pending rulemaking by the Federal Trade Commission to the "safe harbor" provision of the FTC's Telemarketing Sales Rule.[22]

DISCUSSION

In the FNPRM, the Commission acknowledged that the DMA is in the process of creating a ported number database, but that this solution will not allow telemarketers to update their call lists instantaneously when consumers port their wireline numbers to wireless services.[23] As the Commission stated in the FNPRM, when a number is ported to a wireless service, a telemarketer will not have immediate access to the porting information needed to avoid calling the new wireless number.[24] Even if it is possible to establish a direct link to NeuStar's database of ported wireless service numbers, carriers and telemarketers will experience significant time lags throughout the process, during which consumers who have recently ported wireline numbers to wireless services could receive prohibited calls from telemarketers.[25]

The challenge in identifying and scrubbing ported wireless numbers from marketing lists has increased significantly since the Commission issued its Report and Order in this proceeding. In particular, since November 2003, when the Commission's wireless number portability rules went into effect, several million numbers have been ported, including numerous intermodal ports. As a result, thousands of newly ported wireless numbers are appearing in the system each week.[26] Once an intermodal port is completed and confirmed, each ported wireless number must

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22 Id. para. 52.

23 Id. para. 47 and fn. 102, citing DMA/NAA Petition, p. 4.

24 Id. para. 48.

25 Currently, telemarketers do not have a direct link to the Number Portability Administration Center ("NPAC") database. Instead, it is anticipated that NeuStar will take downloads from its NPAC database and create a separate, secure database of numbers to which telemarketers will have access. Telemarketers will then be able to access the secure NeuStar web site and receive a bulk data download of the ported numbers.

26 See http//www.npac.com at NFG_Transactions_Forecasting_Model_v3.0.xls_docs.

be recorded and placed in NeuStar's database. In order to identify numbers that have been ported from wireline subscribers to wireless subscribers that may not be called, intermodal ports must be identified and sifted from this vast pool of ported numbers.

Of particular concern are numbers that have not yet appeared on a "do not call" list when an intermodal port is requested.[27] As subscribers add their numbers to "do not call" lists in increasing numbers, and as more customers seek to port their wireline numbers to wireless service, the likelihood that telemarketers will inadvertently place calls to such wireless numbers is increasing as well. In order to avoid violations of the Commission's rules, telemarketers must update their lists of numbers to reflect intermodal ports that must not be called. To accomplish this "scrubbing" of their lists in less than thirty days, telemarketers must obtain lists of recently ported numbers on an ongoing basis, and must incorporate this information into their databases at top speed.

While some telemarketers may obtain updated lists of recently ported numbers from the NPAC, and may have the resources to sift through such lists and incorporate changes expeditiously, most telemarketers either obtain lists of recently ported numbers from third parties, or forward their own lists to third parties to be "scrubbed" periodically.[28] Even under ideal circumstances - - and the circumstances surrounding intermodal porting are far from ideal - - telemarketers who request updated lists of ported numbers from third parties are highly

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[27] A wireline number that appears on a "do not call" list will not be removed from that list when it is ported to a wireless subscriber. The number will continue to appear on lists provided to telemarketers as a wireline number that telemarketers should not call.

[28] At present, several different entities may be involved in the storage, retrieval and transmission of data concerning intermodal porting, including: NeuStar; large carriers, such as SBC; service bureaus, such as Verisign or Telcordia; and industry groups, such as CTIA, DMA or Accenture, as well as the telemarketer. The "hand-off" of such information from entity to entity is time consuming as well, since each "hand-off" involves a batching process that

unlikely to receive and incorporate these lists into their systems within seven days, and are likely to experience difficulty in meeting a deadline of thirty days.[29] In these circumstances, there is no reason to believe that the current "safe harbor" period of the Commission's telemarketing rules, which allows telemarketers up to thirty days to remove numbers from calling lists once telemarketers are notified that a customer does not wish to be called,[30] should be curtailed if the Commission adopts the proposed limited safe harbor for intermodal ports.

The FNPRM also requests comment on whether the Commission should amend the current "safe harbor" provision of its telemarketing rules, 47 C.F.R. § 64.1200(c)(2)(i)(D), to mirror any amendment adopted in the pending rulemaking by the Federal Trade Commission ("FTC") to the cognate safe harbor provision of that agency's Telemarketing Sales Rule ("TSR"), 16 C.F.R. 310.4(b)(3)(iv).[31] Currently, both the Commission and the FTC have adopted safe harbor regulations applicable to the national do-not-call ("DNC") registry that require a telemarketer to employ a version of the national DNC list obtained no more than three months prior to the date of a telemarketing call.[32]

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accumulates and generates data to a transmission medium, such as an electronic file or a web location.

[29] As the record in CC Docket No. 95-116 makes clear, the ILECs have continued to experience difficulty in implementing intermodal ports, calling the accuracy of current lists of ported numbers into question. See, e.g. Reply Comments of AT&T, CC Docket No. 95-116, filed February 4, 2004, p. 8 ("The wireline carriers cite a combination of factors that have introduced significant difficulties into the process of implementing even simple intermodal ports."). See also, Comments of BellSouth, filed January 20, 2004, pp. 21-22; Qwest, at 10-11; SBC, at 13.

[30] 47 C.F.R. Section 64.1200 (d)(3) ("Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date such request is made.")

[31] FNPRM, para. 52.

[32] Id.

In January, however, Congress mandated that the FTC amend the TSR to require that telemarketers access the national DNC list, and purge numbers in the registry, every month.[33] The FTC has thus initiated a rulemaking to amend the TSR in accordance with its statutory obligation.[34] The FTC in that proceeding is proposing to adopt a requirement that telemarketers obtain the national DNC list thirty days prior to making any telemarketing call.[35]

In the absence of any considerations that militate for a different result,[36] the Commission should conform its safe harbor interval to the FTC's proposed amendment to the TSR. As the FNPRM correctly recognizes, Congress has instructed the Commission to "maximize consistency" with the FTC's telemarketing rules.[37] Failure on the Commission's part to mirror the FTC's 30 day standard would create markedly differing obligations for entities subject to the two agencies' differing spheres of authority over telemarketers.[38] There is no justification for the

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33 See Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 188 Stat. 3 (January 23, 2004), Division B, Title V ("Appropriations Act").

34 See Telemarketing Sales Rule, RIN 3084-0098, Notice of Proposed Rulemaking, 60 F.R. 7330 (February 13, 2004)("FTC NPRM").

35 The FTC's proposal employs the term "thirty (30) days," rather than the term "monthly" used in the Appropriations Act, to improve compliance and remove the ambiguity that would otherwise result from differences in the length of certain months and potential inconsistencies in the timing of downloading from the national DNC registry. See FTC NPRM, 69 F.R. at 7330.

36 Congress has recognized that it would not be possible for the Commission to adopt rules that are identical to those of the FTC in every instance. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report on Regulatory Coordination, DA 03-2855 (September 8, 2003)("FCC Report to Congress"), citing H.R. Rep. No. 108-8 at 4, reprinted in 2003 U. S. Code Congressional & Admin. News, 688, 671. However, the Commission has acknowledged the need for coordination with the FTC to eliminate unnecessary inconsistencies. See, e.g., FCC Report to Congress, para. 23 (identifying inconsistency between the respective agencies' rules for measuring satisfaction of call abandonment standards).

37 See Do-Not-Call Implementation Act, P.L. 108-10, 117 Stat. 557 (2003), Section 3.

38 As the FNPRM observes (para. 52 and n. 113), in addition to common carriers, the FTC lacks jurisdiction over telemarketing by financial institutions (banks, credit unions, savings and loans), insurers and airlines. By contrast, the Commission exercises jurisdiction over all telemarketers' calls.

Commission to create such a disparity between its safe harbor provision and the FTC's impending amendment to its own rule.

Nevertheless, in conforming its safe harbor rule to the FTC's rule, the Commission should recognize that both the federal government and telemarketers will require a reasonable interval to modify their practices to reflect this change in the regulation. The FTC has noted that the national DNC registry will require logic changes and modifications to account for the increased traffic that will result from the reduction in the safe harbor rule's download interval.[39] Telemarketers will also require a reasonable period in which to implement changes in their systems, modify their methods and procedures, and conduct training of their telemarketing personnel regarding the revised safe harbor provision.[40] In no event should the Commission adopt an effective date for its own safe harbor rule change that diverges from the effective date of the FTC amendment; such a discrepancy would create exactly the kind of avoidable inconsistency that Congress has instructed the Commission to avoid.

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39 See FTC NPRM, 69 F.R. p. 7331.

40 Id.

CONCLUSION

Any safe harbor the Commission adopts should provide telemarketers with thirty days in which to obtain data on numbers ported from wireline services to wireless services and to scrub these numbers from their call lists. In addition, the Commission should mirror any amendment adopted by the Federal Trade Commission to the cognate safe harbor provision of the FTC's telemarketing sales rule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Hagi Asfaw, do hereby certify that on this 15th day of April 2004, a copy of the foregoing "Comments of AT&T Corp." was served by electronic mail on the persons listed below.

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